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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

JOSHUA RAFOFSKY and JOSHUA
IRON WING, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

NISSAN NORTH AMERICA, INC., a
California corporation,

Defendant.

Case No. 2:15-CV-01848 AB (MANx)

**[PROPOSED] STATEMENT OF
UNCONTROVERTED FACTS AND
CONCLUSIONS OF LAW FOR
NISSAN'S MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Hearing: Feb. 27, 2017, 10:00 a.m.
Hon. André Birotte, Jr.
Courtroom 7B, 1st St.

Complaint Filed: March 12, 2015

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Defendant Nissan North America, Inc. (“Nissan”) respectfully submits to the Court these proposed uncontroverted facts and conclusions of law in support of Nissan’s Motion for Partial Summary Judgment. Nissan requests that the Court find the following facts uncontroverted and make the conclusions of law as set forth below.

In this document Nissan uses the term “the Apps” to refer specifically to the software applications at issue in this lawsuit: Facebook, Google Search, Pandora, iHeartRadio, Email, and Calendar. Nissan uses the term “InTouch Apps” to refer to the broader set of apps that includes but is not limited to the Apps.

I. Statement of Uncontroverted Facts

Uncontroverted Fact	Supporting Evidence
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A. The Q50—Sales

1. Nissan began selling and leasing the Infiniti Q50 sedan to the public in August 2013.	Ex. 15, ¹ Q50 Nationwide Sales & Leases, July 2015, at 2; Compl. ¶ 3.
2. In the United States, 55% of Q50s were sold or leased on or after February 1, 2014. 38% of Q50s were sold or leased on or after June 1, 2014. 18% of Q50s were sold or leased on or after October 1, 2014.	Ex. 15 at 2-3.
3. As of October 26, 2016, 7,845 Q50s had been sold or leased in California (7,316 excluding fleet sales), and 284 had been sold or leased in Nevada (258 excluding fleet sales).	Ex. 16, Q50 Cal., Nev., and Ill. Sales and Leases, Oct. 26, 2016, at 1.

B. The Q50—Features

4. One of the Q50’s standard features is an infotainment	Ex. 2, Harless & Hoffer Decl. (“H&H
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¹ Unless otherwise indicated, all “Ex.” citations are to the concurrently submitted Declaration of Jonathan A. Enfield in Support of Nissan North America, Inc.’s Motion for Partial Summary Judgment.

1	system called InTouch. InTouch comprises features such as	Decl.”), Dec. 16,
2	a dual-screen touch panel display, audio system, rearview	2016, ¶ 7.
3	camera, and hands-free phone compatibility.	
4	5. InTouch’s touchscreens allow users to control parts of	H&H Decl. ¶ 7.
5	the Q50, such as the audio and climate control systems.	
6	i. The InTouch Apps, Including the At-Issue Apps	
7	6. InTouch utilizes certain applications, or “apps,” that	H&H Decl. ¶ 7.
8	are built into the system. They do not require a smartphone	
9	to operate. These apps include Driving Performance and	
10	Maintenance Notes, as well as Compass (for vehicles with the	
11	optional navigation system).	
12	7. InTouch also utilizes two other kinds of apps—“S1	H&H Decl. ¶ 7.
13	Apps” and “S2 Apps”—which are the subject of this suit.	
14	8. S1 Apps are installed on the Q50 and allow users to	H&H Decl. ¶ 7.
15	control various Internet-based services via InTouch. For	
16	example, the Email app allows users to synchronize and	
17	control their email (e.g., Yahoo, Gmail), and the Calendar app	
18	allows users to do the same for their electronic calendars (e.g.,	
19	Google Calendar). S2 Apps are installed on users’	
20	smartphones and are designed to be controlled via InTouch.	
21	These apps include services such as Facebook and Google	
22	Search.	
23	9. When Nissan began selling the Q50 in August 2013,	H&H Decl. ¶ 8; Ex.
24	the Q50 did not have any S1 or S2 Apps available. In the	21, Electronic Field
25	weeks directly before and after Nissan began selling the Q50,	Comm’n, Aug. 15,
26	Nissan planned to make certain S1 and S2 apps available to	2013, at 7; Ex. 3,
27	Q50 customers after the start of sales via a free software	Weisinger Decl.,
28		Dec. 19, 2016, ¶ 7.

1	update.	
2	10. On or about the start of sales, Nissan informed	Ex. 24, Visor
3	prospective customers that these apps were “currently	Sleeve, Oct. – Dec.
4	planned to be released this fall.”	2013; Weisinger
5	11. In late 2013, it became apparent to Nissan that it could	Decl. ¶ 7.
6	not release the Apps in fall 2013.	Ex. 9, Brand Dep.,
7		April 7, 2016,
8	12. In January 2014, Nissan began informing customers,	135:6-7.
9	dealers, and others that the precise release date of the Apps	Ex. 29, ITB14-004,
10	had “not been determined” and that Nissan would provide	Jan. 24, 2014, at 24;
11	more information as it became available.	Ex. 32, Electronic
12		Field Comm’n, Feb.
13		19, 2004, at 1; Ex.
14	13. On September 24, 2014, Nissan made Facebook,	26, InTouch and
15	Google Search, Calendar, and Email available to customers	DAS Service
16	as a software update.	Campaign, Jan. 23,
17		2014 at 1-2.
18	14. On July 1, 2015, Facebook chose to change its	Ex. 34, Quick Start
19	interface. This made certain Facebook features that had been	Guide, Sept. 2014,
20	available via InTouch since September 24, 2014 unavailable	at 1.
21	for use via vehicle infotainment systems, including InTouch.	Ex. 42, Decl. of
22	After Facebook’s change to its interface, enrolled InTouch	Sanjay Shukla, Jan.
23	users could still use Facebook’s Check In and Events features.	27, 2017, ¶¶ 2-4;
24	Since before the Q50 went on sale, Nissan had been informing	Ex. 36, Email, June
25	customers that “[c]ertain vehicle services . . . provided by	26, 2015, at 1; Ex.
26	independent companies are not within Infiniti’s control and	15 at 7; Ex. 35,
27	are subject to change without notice or liability to Infiniti and	InTouch Apps User
28	its affiliates and agents.”	Guide, c. Sept. 22,
		2014.

1 **15.** Nissan has been unable to make Pandora and
 2 iHeartRadio available as apps on the InTouch system.
 3 However, Q50 customers with compatible smartphones can
 4 still use those services. By connecting a smartphone to
 5 InTouch, a customer can listen to audio from Pandora or
 6 iHeartRadio through the Q50's audio system. In addition, a
 7 customer can use the Q50's touchscreen or steering wheel
 8 hard buttons to play, pause, and skip songs on these services.
 9 Customers using Pandora in this manner cannot change
 10 Pandora stations or provide thumbs-up/thumbs-down
 11 feedback via the InTouch. Controlling those features requires
 12 using the connected smartphone's touchscreen.

H&H Decl. ¶ 11;
 Ex. 4, E. Weisinger
 Dep. 141:1–142:3;
 Weisinger Decl. ¶ 9
 & Ex. 3-1, ¶ 9; Ex.
 12, Rafofsky Dep.,
 Dec. 13, 2016,
 93:22-95:12.

13 **C. Customer Sentiment Regarding The Apps' Availability.**

14 **16.** Over 1,500 customers completed a survey about the
 15 Q50 in January and February 2014, when Facebook, Google
 16 Search, Calendar, and Email were not yet available for
 17 InTouch.

Ex. 7, Infiniti Q50
 Early Buyer Study,
 Mar. 2014, at 7.

18 **17.** 7% of respondents to the January 2014 and February
 19 2014 survey desired improvements to the InTouch Apps,
 20 including the Apps' availability.

Ex. 7 at 19.

21 **18.** Fewer than 10% of car owners regularly listen to online
 22 radio while in their cars.

Weisinger Dep.
 147:18-148:3;
 Weisinger Decl.
 ¶ 14.

24 **D. Enrolling For And Using The Apps.**

25 **19.** Although InTouch is standard on all Q50s, in order to
 26 use the Apps on InTouch, a customer must take two steps.
 27 First, she must enroll online for a free Infiniti Owner Portal
 28

H&H Decl. ¶ 7;
 Weisinger Decl. ¶ 8;
 Compl. ¶ 4.

1	Account. Second, a customer must download and install the	
2	free Infiniti InTouch App on her smartphone. The InTouch	
3	App is available from the Apple App store and the Google	
4	Play store.	
5	20. As Nissan informed its customers, taking those steps	H&H Decl. ¶ 7; Ex.
6	will only work if a customer has a compatible smartphone.	34 at 1; Ex. 8, Karen
7	InTouch works with iPhones and Android devices, but it does	Baehner Dep., May
8	not work with Blackberries or with Microsoft Windows	13, 2016, 95:6-11;
9	smartphones.	Weisinger Decl. ¶ 8;
10		Ex. 37, InTouch
11	21. A customer must also have an account or accounts with	FAQ, Nov. 9, 2016;
12	relevant third-party providers such as Google Calendar and	Ex. 21 at 7.
13	Facebook.	
14	22. More than 80% of Q50 customers did not enroll for an	H&H Decl. ¶ 7.
15	Infiniti Owner Portal Account.	
16		Weisinger Dep.
17		143:19-144:20,
18		155:4-155:6;
19	23. Across “all Nissan and Infiniti vehicles available in the	Weisinger Decl.
20	United States capable of allowing customers to use	¶ 11; H&H Decl.
21	smartphone apps via their vehicle infotainment systems,”	¶ 18 & Fig. 1; Ex.
22	more than 75% of Nissan customers have never enrolled with	6, App Enrollment
23	Nissan to use those apps. For example, as of April 2016	& Usage, at 2-3; Ex.
24	Pandora and iHeartRadio were available on the 1,140,182	5, App Availability,
25	vehicles using Nissan’s LCN2K and DA infotainment	at 1-6;
26	operating systems. Of those vehicles, only 24.3% of owners	
27	had enrolled to use those apps.	
28	24. As of April 2016, the Facebook app had been used	Ex. 6 at 3; Ex. 2 at

1	817,999 total times on all Nissan and Infiniti vehicles. That	10 (Fig. 2);
2	constitutes 2.77 uses per enrolled vehicle and 0.66 uses per	Weisinger Decl.
3	vehicle capable of providing Facebook.	¶ 12.
4	25. As of April 2016, the Google Search app had been used	Ex. 6 at 3; H&H
5	826,004 total times on all Nissan and Infiniti vehicles. That	Decl. at 10 (Fig. 2);
6	constitutes roughly 2.58 uses per enrolled vehicle and 0.61	Ex. 3, ¶ 12 & n.2.
7	uses per vehicle capable of providing Google Search.	
8	26. As of April 2016, the Pandora app had been used	Ex. 6 at 3; H&H
9	289,628 total times on all Nissan and Infiniti vehicles. That	Decl. at 10 (Fig. 2);
10	constitutes 1.05 uses per enrolled vehicle and 0.25 uses per	Weisinger Decl.
11	vehicle capable of providing Pandora.	¶ 12.
12	27. As of April 2016, the iHeartRadio app had been used	Ex. 6 at 3; H&H
13	181,903 total times on all Nissan and Infiniti vehicles. That	Decl. at 10 (Fig. 2);
14	constitutes 0.66 uses per enrolled vehicle and 0.16 uses per	Weisinger Decl.
15	vehicle capable of providing iHeartRadio.	¶ 12.
16	28. At his May 4, 2016 deposition, Nissan Manager of	Weisinger Dep.
17	Cross Carline Product Planning Eric Weisinger answered	142:12-144:20.
18	questions by counsel for Nissan regarding the levels of app	
19	enrollment and usage by Nissan customers. Plaintiffs'	
20	counsel did not ask Mr. Weisinger any questions on those	
21	topics.	
22	29. On June 15, 2016, Nissan produced to Plaintiffs the	Weisinger Decl.
23	spreadsheets regarding app enrollment and usage that Mr.	¶¶ 11-13 & ¶ 11 n.1;
24	Weisinger references in his declaration. The spreadsheets	Pls.' Cert. Reply,
25	have the following beginning Bates numbers: NNAZe-	Jan. 23, 2017, Dkt.
26	0058330, NNAZe-0058331, and NNAZe-0058332.	No. 88-1, at 13:8-9.
27	30. The Marketing Initiatives document Bates-stamped	Enfield Decl. ¶ 18;
28		Ex. 1, Calder

<p>1 NNAZe-0058510 (Ex. 17) was produced to Plaintiffs on July 2 11, 2016. Plaintiffs used it in support of their class 3 certification memorandum as Ex. 2, and Dr. Calder reviewed 4 it and cited it in his expert report.</p>	<p>Report, Nov. 17, 2016, ¶¶ 7-8 & Ex. B.</p>
<p>5 31. The plaintiff in the related <i>Zingerman</i> action did not 6 serve Nissan with any documents requests regarding app 7 enrollment or usage. Plaintiffs in this matter have not served 8 any document requests separate from the <i>Zingerman</i> 9 plaintiff's.</p>	<p>Ex. 14, L. Zingerman, D.D.S., P.C., RFPs.</p>
<p>10 32. The parties to this action and to the <i>Zingerman</i> action 11 agreed to allow 15 total depositions per party in this action 12 and <i>Zingerman</i> combined. Plaintiffs took a combined total of 13 10 depositions.</p>	<p>Joint 26(f) Report, Dkt. No. 42, at 6:5- 10; Pls.' Cert. Reply 13:6-7.</p>

E. Plaintiff Joshua Rafofsky

<p>15 33. On September 21, 2013, Joshua Rafofsky leased a Q50 16 from Glendale Infiniti of Glendale, California for his Q50. 17 The lease agreement does not mention InTouch or the Apps. 18 The lease expired on December 21, 2016. At the time he 19 signed the lease, Mr. Rafofsky lived in California.</p>	<p>Rafofsky Dep. 25:1- 2, 37:14-21; Ex. 39, Rafofsky Lease Agreement, Sept. 21, 2013, at JR- 0017.</p>
<p>20 34. Prior to leasing the vehicle, Mr. Rafofsky visited 21 Glendale Infiniti a handful of times. Mr. Rafofsky does not 22 recall visiting any other Infiniti dealership. His first visit was 23 in roughly June 2013. He testified that he remembered 24 visiting Glendale Infiniti again in roughly July 2013 for a Q50 25 promotional event before the Q50 was available for lease or 26 purchase. He may have visited the dealership one or two 27 other times before September 21, 2013 (when he returned to 28</p>	<p>Rafofsky Dep. 53:10-16, 55:4-10, 55:11-24, 56:18- 57:2, 64:22-65:5, 65:6-7, 66:14-67-2.</p>

the dealership to sign the lease), but he is not sure.

35. Between Mr. Rafofsky's visit to Glendale Infiniti for the promotional event and his signing the lease on September 21, 2013, Glendale Infiniti employees—particularly salesman Danny Geris—repeatedly contacted Mr. Rafofsky to discuss the Q50, but those contacts focused on procedural details of a potential lease and did not involve InTouch or the Apps. To the extent that any of his interactions with dealership employees touched on the Q50's features, Mr. Rafofsky took their comments “with a grain of salt because [he] knew that they were salespeople.”

Rafofsky Dep.
81:12-82:15.

36. Mr. Rafofsky testified that he believed that the text messages and phone calls from Glendale Infiniti salesperson Danny Geris were not part of any uniform directive from Nissan to its dealers and instead were undertaken at Mr. Geris's own initiative.

Rafofsky Dep.
80:11-16.

37. Mr. Rafofsky testified that the following sources of information were relevant to his decision to lease his Q50: (1) a brochure or pamphlet that he saw at the dealership in roughly June and July 2013; (2) a video advertisement that he saw either on television or on the Internet, likely sometime between July and September 2013; (3) information in a display stand that contained the brochure/pamphlet that he saw in roughly June and July 2013; (4) a page on an Infiniti website that he likely saw sometime between July and September 2013. Mr. Rafofsky testified that he did not remember any other representations by Nissan about InTouch

Rafofsky Dep.
62:25-64:5, 66:2-16,
67:3-68:4, 68:19-20,
72:23-76:9.

1	being relevant to his decision to lease the car.	
2	38. Mr. Rafofsky did not take a copy of the	Rafofsky Dep. 13:16-14:7, 60:11-21, 61:1-3, 68:5-7; Ex. 19, Screen Grab, at 1.
3	brochure/pamphlet that he saw at the dealership in roughly	
4	June and July 2013 and does not have a copy of it. He does	
5	not have copies of the display stand or video advertisement.	
6	A screen grab that Mr. Rafofsky took of the Infiniti web page	
7	is attached to the Enfield Declaration as Exhibit 19. The	
8	screen grab references the Apps, listing Email and Calendar	
9	as “Coming Soon.” Mr. Rafofsky testified that he saw this	
10	web page before leasing the car and no earlier than July 2013,	
11	but could not remember the exact date.	
12	39. Mr. Rafofsky testified that he remembered that the	Rafofsky Dep. 63:4-7.
13	brochure/pamphlet mentioned InTouch.	
14	40. Mr. Rafofsky testified that he remembered that the	Rafofsky Dep. 63:8-19.
15	video advertisement discussed InTouch in connection with	
16	the topics of “world of connection, smartphone apps, app	
17	ecosystem, [and] smart car.”	
18	41. Mr. Rafofsky testified that he had no interest in Email,	Rafofsky Dep. 113:25-114:13; Ex. 13, Rafofsky Interrog. Resps., Nov. 9, 2016, Nos. 10 & 13.
19	Calendar, or Google Search and never planned to use them	
20	via InTouch.	
21		
22	42. Mr. Rafofsky did not remember seeing the InTouch-	Rafofsky Dep. 74:24-75:4.
23	related visor sleeve that is attached to the Enfield Declaration	
24	as Exhibit 24.	
25	43. Mr. Rafofsky did not contact anyone from Nissan in	Rafofsky Dep. 88:4-25.
26	connection with his decision to lease the Q50. Nobody from	
27	Nissan contacted Mr. Rafofsky about the Q50 prior to the	
28		

lease's start date.

44. Mr. Rafofsky knew that the Apps were not available when he leased the Q50 on September 21, 2013. He testified that prior to leasing the vehicle he was never given a specific date as to when the Apps would be available. Mr. Rafofsky testified that he saw a statement regarding fall 2013 availability for the Apps in connection with the web page that he saw before leasing the Q50 (*see supra* ¶ 38) but that he could not remember the exact wording. He testified that at the time he leased the vehicle he was unsure exactly when he expected the Apps would be available but believed that it would one to six months after the date of his lease. He testified that that estimate was “an assumption [he] made just based on . . . what [he] had seen from Infiniti and the [dealership] employees [he] spoke to.” In roughly January 2014, Mr. Rafofsky asked his salesperson at Glendale Infiniti when the Apps would be available, and the salesperson said they would be available in six months to a year.

Rafofsky Dep.
62:12-24, 160:21-23, 161:2-13, 161:21-22,

F. Plaintiff Joshua Iron Wing

45. On November 11, 2013, Mr. Iron Wing leased his Q50 from Park Place Infiniti in Las Vegas, Nevada. The lease agreement does not mention InTouch or the Apps. Mr. Iron Wing's lease will expire in February 2017. Mr. Iron Wing lived in Nevada when he signed his lease.

Ex. 11, Iron Wing Dep., Nov. 18, 2016, 13:8-11, 14:1-4, 37:7-21; Ex. 40, Iron Wing Lease Agreement, at 1-2.

46. Prior to leasing his Q50, Mr. Iron Wing had approximately 8-12 conversations with employees at Park Place Infiniti. He testified that at least some of those

Iron Wing Dep. 31:20-32:23, 52:20-53:3; 62:13-18, 65:18-66:8, 66:23-

1	conversations touched on InTouch and its features: the	68:4, 79:6-9,
2	system's start-up and processing time; the Q50's back-up	159:11-25.
3	camera and its predictive parking lines; and planned software	
4	updates that would supply the Apps and make other	
5	improvements, including the timing of those updates.	
6	47. Mr. Iron Wing testified that his conversations with	Iron Wing Dep.
7	Park Place Infiniti employees were important to his decision	108:8-109:8.
8	to lease the Q50 and probably the most important source of	
9	information of his understanding of InTouch generally and	
10	the Apps specifically: "I think the sales pitch [from dealership	
11	employees], and then the, actually having somebody telling	
12	you and talking to you about it. I think that would be true to	
13	most sales pitches and going in and actually seeing and having	
14	them tell you something."	
15	48. Mr. Iron Wing testified that he could not tell whether	Iron Wing Dep.
16	his conversations with Park Place Infiniti salespeople were	75:5-11.
17	scripted in part or in whole.	
18	49. Mr. Iron Wing testified that before leasing his Q50 he	Iron Wing Dep.
19	saw something about InTouch on a Nissan web page or pages,	78:5-79:2, 85:9-13,
20	possibly a simulation of the InTouch system. He testified that	87:15-21.
21	he did not remember exactly what he saw. He testified that	
22	he also saw information about the Q50 and possibly	
23	information about InTouch on third-party websites but was	
24	not sure which sites or what they said. He testified that he	
25	could not remember which information he saw on Nissan's	
26	website and which he saw on unaffiliated websites.	
27	50. Mr. Iron Wing testified that he could not remember	Iron Wing Dep.
28		87:2-25.

1	with certainty having seen any representations by Nissan	
2	about InTouch or the Apps in addition to what he saw on the	
3	Internet as described in Paragraph 49.	
4	51. Mr. Iron Wing testified that before leasing his Q50 he	Iron Wing Dep.
5	might have seen a television advertisement for the Q50 but	64:12-19, 85:14-16,
6	could not remember whether it mentioned InTouch.	156:11-157:1.
7	52. Mr. Iron Wing testified that before leasing his Q50 he	Iron Wing Dep.
8	might have seen one or more magazine advertisements for the	64:20-65:1, 156:11-
9	Q50 but was not sure and could not remember whether any	157:1.
10	such advertisements actually mentioned InTouch.	
11	53. Mr. Iron Wing testified that he may have seen or taken	Iron Wing Dep.
12	a brochure for the Q50 but could not remember.	77:23-78:4, 88:10-
13		15.
14	54. Mr. Iron Wing did not contact anyone from Nissan in	Iron Wing Dep.
15	connection with his decision to lease the Q50. Nobody from	34:1-9, 89:11-18.
16	Nissan contacted Mr. Rafofsky about the Q50 prior to the	
17	lease's start date.	
18	55. Mr. Iron Wing testified that at about the time he leased	Iron Wing Dep.
19	the Q50 on November 11, 2013, the sales staff at Park Place	79:5-80:2.
20	Infiniti told him that the Apps would be available about a	
21	month later.	

G. Nissan's Representations About InTouch.

22	56. From January 14, 2013 until August 1, 2013, Infiniti	Ex. 17 at 7.
23	maintained an online microsite dedicated to the Q50 that	
24	referenced the Apps.	
25	57. Beginning at least as early as the July 2013 Q50	E.g., Ex. 20, Q50
26	brochure and continuing until the Apps became available,	Brochure at 17; Ex.
27	Nissan consistently indicated that the Apps were not yet	23, Car and Driver
28		Ad, Oct. 2013; Ex.

1 2 3 4 5 6	available for use, often using the phrase “late availability.” During that time, Nissan also consistently stated that “[n]ot all app features [were] available for all models.”	30, Car and Driver Ad, Feb. 2014; Infiniti website, Compl. ¶ 5:9, 17; Ex. 22, Floorstand, Aug. 2013 – March 2014, at 2 (cited in Ex. 17 at 21)
7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	58. The Q50 brochure said, “This brochure is intended for general descriptive and informational purposes only. It is subject to change and does not constitute an offer, representation or warranty (express or implied) by Nissan North America, Inc. Interested parties should confirm the accuracy of any information in this brochure as it relates to a vehicle directly with Nissan North America, Inc., before relying on it to make a purchase decision. Nissan North America, Inc., reserves the right to make changes, at any time, without prior notice, in prices, colors, materials, equipment, specifications, and models and to discontinue models or equipment. Due to continuous product development and other pre- and post-production factors, actual vehicle, materials and specifications may vary from this brochure . . . Availability and delivery times for particular models or equipment may vary.”	Ex. 20 at 17, 17.3.
23 24 25 26 27 28	59. As Q50’s August 2013 start of sales drew near, Nissan added a new Q50 landing page to its website that provided notice that the Apps had “Expected Fall 2013 Availability.” On August 15, 2013, Nissan asked dealers to “set consumer expectations for connected services availability.” In that	Ex. 17, Marketing Initiatives, July 10, 2014 at 8; Cert. Mem. 6:20-21; Ex. 21 at 1, 4, 5; Compl. ¶ 18.

<p>communication, Nissan indicated that it planned to make the Apps available a via software update “currently expected to be [available] Fall 2013.” That communication cited from the then-current version of the InTouch FAQ on its website also indicating that the update was “currently expected to be Fall 2013” and “planned for Fall 2013.”</p>	
<p>60. In October 2013, Nissan began attaching sleeves to the visors of Q50s indicating that the Apps had “Expected Fall 2013 Availability.” Nissan also shipped visor sleeves to dealers to install in the Q50s that dealers already had in inventory. By December 2013, Nissan was no longer installing those visor sleeves before shipping the cars to dealers.</p>	<p>Ex. 17 at 15; Ex. 25, Email, Dec. 5, 2013 at 2; Pls.’ Cert. Mem. 7:21-23.</p>
<p>61. By January 2014, Nissan was using a variety of media to announce to customers, dealers, and others that, while it was “still diligently working” on the Apps, when the Apps would “be available ha[d] not yet been determined.” This information was available online, including on third-party user discussion forums and the U.S. Department of Transportation’s National Highway Traffic Safety Administration website. Until Nissan knew that the Apps would be available in September 2014, Nissan continued announcing that the Apps’ availability date “ha[d] not been determined.”</p>	<p><i>E.g.</i>, Ex. 29 at 24; Ex. 32 at 1; Ex. 31, Ex. 26 at 1-2; ITB14-0004a, Feb. 14, 2014, at 24; Ex. 27, Forum Post, Q50SSS, Jan. 13, 2014, at 1; Ex. 29 at 24; Ex. 31 at 24; Ex. 33, Forum Post, FolsomDude, Sept. 18, 2014, at 1 (cited in Compl. ¶ 30).</p>
<p>62. By January 2014, Nissan had updated nearly “all areas of the website” to reflect that it did not know when the Apps would be available.</p>	<p>Ex. 28, Email, Jan 17, 2014, at 1, 3.</p>

<p>63. Nissan removed from circulation no later than May 8, 2014—and in many cases earlier—all the materials that specifically referenced the Apps that Plaintiff’s expert Dr. Calder identifies in his report. Dr. Calder cites the following representations that mentioned the Apps specifically: the pre-launch microsite (removed August 1, 2013); two portions of Nissan’s website (removed May 8, 2014); a digital PDF (removed May 1, 2014); the visor sleeve (removed c. December 2013); a letter sent to new owners (removed April 14, 2014); and digital magazine content (removed December 31, 2013).</p>	<p>Calder Report ¶ 7; Ex. 17 at 7, 9, 13-15, 19, 22; Ex. 25 at 2.</p>
<p>64. All the planned or actual representations by Nissan identified in Plaintiff’s class certification briefing that specifically referenced the Apps were made months before May 8, 2014 and/or removed by May 8, 2014. Plaintiffs’ Memorandum cites the following representations that reference the Apps specifically: January 14, 2013 Infiniti Facebook post (4:23-24) (posted Jan. 14, 2013); planned default screen for Apps (7:15-20) (planned as of April 6, 2013); interim brochure (7:23-25) (replaced late July 2013); brochure (7:23-25) (released late July 2013); pre-launch microsite (4:24-25) (removed Aug. 1, 2013); pre-launch promotional events and demonstrations (5:21-22) (finished before Aug. 2013 launch); September & October 2013 magazine ads (8:2-15) (concluded Oct. 2013); website as of January 2014 (5:1-17) (occurred Jan. 2014); January 2014 Consumer Electronics Show (4:23-24) (occurred Jan. 2014);</p>	<p>Pls.’ Cert. Mem. 4:16-20 (Jan. 2014 Consumer Electronics Show), 4:23-24 (Jan. 14, 2013 Infiniti Facebook post), 5:1-17 (Jan. 2014 website), 5:21-22 (pre-launch promotional events and demonstrations), 7:15-20 (planned default screen for Apps); Ex. 17 at 7 (pre-launch microsite), 8 (website generally), 13 (online interactive demonstration/simulator), 17 (interim brochure), 18</p>

<p>January & February 2014 magazine ads (8:15-18) (concluded Feb. 2014); website generally (5:26-6:26) (text removed by Mar. 6, 2014, images by Mar. 17, 2014); Q50 floorstand (7:13-15) (removed March 2014); online interactive demonstration (6:27-7:6) (removed May 8, 2014). Plaintiff's Reply mentions some of the materials indicated above but does not cite new materials.</p>	<p>(brochure); 21 (floorstand), 24 (Sept. & Oct. 2013 magazine ads), 25 (Jan. & Feb. 2014 magazine ads); Pls.' Cert. Reply 10:1-12.</p>
<p>65. The so-called Monroney stickers that were intended to be displayed in the windows of all new Q50s available for sale or lease by dealers did not refer to the Apps specifically but did refer to the InTouch Apps. In its entirety, the text about the InTouch Apps reads, "Infiniti InTouch Apps."</p>	<p>Ex. 18, Sample Q50 Monroney Label at 1; Pls.' Cert Mot. 7.</p>

H. New Vehicle Limited Warranty

<p>66. The 2014 New Vehicle Limited Warranty ("Limited Warranty") applicable to the Q50 "covers any repairs needed to correct defects in materials or workmanship of all parts and components of each new Infiniti vehicle supplied by Infiniti." The Limited Warranty states, "Infiniti does not authorize any person to create for it any other warranty, obligation or liability in connection with this vehicle."</p>	<p>Ex. 38, Limited Warranty, at 5; <i>see also</i> Compl. ¶¶ 67, 112-13 (citing Limited Warranty).</p>
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I. Dr. Calder's Report

<p>67. Dr. Calder opines that Nissan's "entire marketing strategy [for the Q50] was to use the Advertised Apps/Functions to attract consumers who might not otherwise have purchased the Q50."</p>	<p>Calder Report ¶ 4; Ex. 10; Calder Dep., Jan. 17, 2017, at 102:7-16.</p>
<p>68. Dr. Calder testified that he had not done any analysis of how or whether Nissan had promoted the non-Apps</p>	<p>Calder Dep. 242:2-12.</p>

1	features of the Q50 such as the new platform, the new styling,	
2	or the new mechanical and safety features.	
3	69. Dr. Calder opines that customers likely were “heavily	Calder Report ¶ 9;
4	influenced” by Nissan’s statements about the Apps but	Calder Dep. 97:21-
5	testified that he could not estimate how many people likely	99:8, 100:4-7,
6	were influenced by the Apps or by Nissan’s statements about	174:8-12.
7	them.	
8	70. Dr. Calder opines that “consumers valued being able to	Calder Report ¶¶ 10,
9	benefit from Internet services such as email search and	12.
10	Facebook and Pandora in their automobiles” and that	
11	“[c]onsumers would have been especially receptive to	
12	InTouch music streaming.”	
13	71. Dr. Calder testified that he could not define the	Calder Dep.
14	popularity of the Apps in “an exact quantitative way.”	31:16-23.
15	72. Dr. Calder’s testified that, contrary to his report, when	Calder Dep. 179:8-
16	given a list of 10 potential features, only about 22% of U.S.	20, 181:15-17,
17	consumers contemplating the purchase of any car chose the	182:19-24; Calder
18	ability to use smartphone apps via a vehicle infotainment	Report ¶ 11; <i>see</i> Ex.
19	system as one of their top four features of interest. His report	41 at 3.
20	put that figure at 35%.	
21	73. Dr. Calder testified that he considered Pandora to be	Calder Dep. 33:20-
22	“extremely popular” but that he would not attempt to estimate	36:13.
23	what percentage of the population used it because “the	
24	ordinary understanding of the word ‘extremely,’ . . . doesn’t	
25	require the specification of an exact rate” and that he did not	
26	know the relevant information.	
27	74. Dr. Calder testified that he considered iHeartRadio to	Calder Dep.
28		38:14-40:15.

1	be “one of the more popular [music] streaming services” but	
2	that he did not have “numerical values” as to how many	
3	people used either iHeartRadio specifically or music	
4	streaming services generally.	
5	75. Dr. Calder testified that he considered Facebook to be	Calder Dep. 45:20-
6	“[e]xtremely popular” but did not have any numerical	46:9.
7	information about how many people in the United States use	
8	Facebook or how popular it is in comparison to iHeartRadio	
9	and Pandora.	
10	76. Dr. Calder opines that “any failure of the advertised	Calder Report ¶¶ 4,
11	apps/functions must have substantially compromised the	18.
12	value of the Q50 automobile to buyers.”	
13	77. Dr. Calder testified that in his report he did not try to	Calder Report ¶¶ 4,
14	place a dollar value on “any failure of the advertised	18; Calder Dep.
15	apps/functions” and that he could not do so.	109:20-23,
16		110:20-111:7.
17	78. Dr. Calder testified that in his report he treated the	Calder Dep.
18	existence of “any failure” of the Apps as a subjective	116:1-8, 117:7-14.
19	conclusion by the individual consumer that Nissan did not	
20	“deliver on the brand promise.”	
21	79. Dr. Calder testified that the Early Buyer Study showed	Calder Dep.
22	that 15% of Q50 customers were either somewhat or very	219:19-220:3,
23	dissatisfied with their Q50s and that 3% of Q50 customers	221:12-15.
24	indicated both that they were dissatisfied and that their	
25	dissatisfaction involved the lack of “promised features,”	
26	including the Apps.	
27	80. Dr. Calder testified that “by definition, there’s no	Calder Dep.
28	failure” as to the relevant features where a company delivers	118:6-16.

1	those features as promised. He testified that this would	
2	include a circumstance where Facebook and Google Search	
3	“were the only things promised” and Nissan delivered them.	
4	81. Dr. Calder testified he had a “general understanding	Calder Dep.
5	that there were changes in specifics” in Nissan’s statements	164:7-19.
6	about the Apps over time but that he had “not done a detailed	
7	analysis of that” and could not identify the changes. He	
8	testified that analyzing such changes “didn’t seem necessary	
9	for the point [he was] making.”	
10	82. Dr. Calder testified that his analysis of the impact that	Calder Dep.
11	Nissan’s statements had on consumers assumed that where a	166:21-167:14.
12	company initially states that a product offers feature X, its	
13	statement continues to influence consumers even where the	
14	company later explicitly announces that feature X is not	
15	available on that product.	
16	83. In preparing his report, Dr. Calder did not review data	Calder Dep. 230:18-
17	involving enrollment for or usage of the Apps, including Eric	231:17; <i>see</i>
18	Weisinger’s deposition testimony on that topic and the	<i>generally</i> Calder
19	portions of Mr. Weisinger’s November 11, 2016 declaration	Report; <i>see</i>
20	regarding that topic. Dr. Calder’s report does not address	Weisinger Dep.
21	Apps enrollment or usage. Dr. Calder is confident that the	143:19-147:8;
22	opinions expressed in his report would not change if he were	Weisinger Decl.
23	to review that data.	¶¶ 11-14 & Ex. 3-A
24		¶¶ 11-14.

II. Conclusions of Law

A. Summary Judgment Standard And Burdens.

84. Summary judgment is proper where the evidence, viewed in the light most

1 favorable to the non-moving party presents no genuine issue of material fact and
2 supports judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*,
3 477 U.S. 317, 322-23 (1986). A genuine issue of material fact exists only when “a
4 reasonable jury could return a verdict [in favor of] the non-moving party.” *Anderson v.*
5 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

6 **85.** “[A] non-movant must show a genuine issue of material fact by presenting
7 *affirmative evidence* from which a jury could find in his favor.” *F.T.C. v. Stefanchik*,
8 559 F.3d 924, 929 (9th Cir. 2009); *see also Celotex*, 477 U.S. at 322. “A non-movant’s
9 bald assertions or a mere scintilla of evidence in his favor are both insufficient to
10 withstand summary judgment.” *Stefanchik*, 559 F.3d at 929. The moving party may
11 establish the absence of a genuine issue of material fact by “‘showing’—that is, pointing
12 out to the district court—that there is an absence of evidence to support the nonmoving
13 party’s case.” *Celotex*, 477 U.S. at 325.

14 **B. App Enrollment And Usage Data.**

15 **86.** Nothing in Rule 26(e) of the Federal Rules of Civil Procedure bars consideration
16 of the apps enrollment and usage data offered by Nissan as Exhibits 5 and 6 to the
17 Enfield Declaration in support of Nissan’s motion for partial summary judgment
18 because Nissan did not fail to supplement a disclosure or discovery response in a timely
19 manner.

20 **C. Relationship Between Named Plaintiffs’ Claims And Class Claims.**

21 **87.** Where the sole representative plaintiff for a given claim cannot survive summary
22 judgment on that claim, neither can the putative class. *Los Gatos Mercantile, Inc. v.*
23 *E.I. DuPont De Nemours & Co.*, No. 13-CV-01180-BLF, 2014 WL 4774611, at *4
24 (N.D. Cal. Sept. 22, 2014).

25 **88.** Of the named plaintiffs, only Mr. Rafofsky could represent a California class,
26 and only Mr. Iron Wing could represent a Nevada class. *E.g., Mazza v. Am. Honda*
27 *Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) (holding that “each class member’s
28

1 consumer protection claim should be governed by the consumer protection laws of the
2 jurisdiction in which the transaction took place”).

3 **D. Nissan Did Not Breach Any Contract.**

4 **89.** A contract can exist only where the parties “reach mutual assent or consent on
5 definite or complete terms” regarding “all particulars essential to [the contract’s]
6 enforcement.” *Netbula, LLC v. BindView Dev. Corp.*, 516 F. Supp. 2d 1137, 1155.
7 (N.D. Cal. 2007) (California law); *accord Wilson v. KRD Trucking W.*, No. 2:10-CV-
8 00163-KJD, 2012 WL 1900941, at *3 (D. Nev. May 24, 2012) (Nevada law).

9 **90.** A lack of competent evidence showing “the intention of the parties in material
10 particulars” with sufficient clarity to define “the scope of the duty and limits of
11 acceptable performance” renders any purported contract void and unenforceable.
12 *Netbula*, 516 F. Supp. at 1155.

13 **91.** There is no evidence establishing that any Nissan dealership was Nissan’s agent
14 for the purpose of entering into contract or warranty and no reason to presume such a
15 relationship. *Herremans*, 2014 WL 5017843, at *6 (C.D. Cal. Oct. 3, 2014).

16 **92.** Neither the named Plaintiffs nor any member of the putative classes entered into
17 a contract (1) with Nissan (2) about the Apps with sufficiently definite terms to be
18 enforceable.

19 **93.** Under California’s and Nevada’s Statutes of Frauds, contracts for sale of goods
20 for more than \$500 are unenforceable unless they are in writing and signed by the party
21 to be charged. Cal. Com. Code § 2201(1); N.R.S. § 104.2201. There is no evidence
22 establishing the existence of any such contract in connection with the sale of a Q50 that
23 includes terms about the Apps.

24 **94.** Under the Nevada Statute of Frauds, lease contracts for payments totaling \$1,000
25 or more are unenforceable unless they are in writing and signed by the party to be
26 charged. N.R.S. § 104A.2201. There is no evidence establishing the existence of any
27 such contract in connection with the lease of a Q50 that includes terms about the Apps.
28

E. Nissan Did Not Violate the NDTPA.

95. To prevail on a claim under the NDTPA, a private plaintiff must show “(1) an act of consumer fraud by the defendant (2) caused (3) damage to the plaintiff.” *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 658 (D. Nev. 2009).

96. Under the NDTPA, substantiating a claim of misrepresentation requires actual reliance by the plaintiff. *Id.*

97. There is no evidence that Mr. Iron Wing or any member of the putative Nevada class relied on any specific misrepresentation.

98. Under the NDTPA, misrepresentation claims generally require a knowing misrepresentation. *See* N.R.S. § 598.0915.

99. There is no evidence that Nissan made a knowing misrepresentation either to Mr. Iron Wing or to any member of the putative Nevada class.

100. Mr. Iron Wing cannot show that he saw any specific representation or omission by Nissan that was knowingly false or misleading because he cannot identify any specific representation or omission by Nissan. *See Simon v. Bank of Am., N.A.*, No. 10-CV-00300-GMN-LRL, 2010 WL 2609436, at *9 (D. Nev. June 23, 2010).

F. Plaintiffs Have No Claims As To Facebook, Google Search, Email, Or Calendar.

101. Because Nissan provided Facebook, Google Search, Email, and Calendar and did not guarantee a delivery date for those four apps, Nissan is not liable as to those apps under any of Plaintiffs’ asserted causes of action.

G. Summary Judgment To Nissan Is Proper On Plaintiffs’ Class Claims.

i. Most Customers Suffered No Injury.

102. Nevada and California express warranty law, the CLRA, the UCL, and the NDTPA all require establishing an injury. *Houston v. Medtronic, Inc.*, 957 F. Supp. 2d 1166, 1181 (C.D. Cal. 2013); *Scovil v. Medtronic Inc.*, No. 2:14-CV-00213-APG, 2015 WL 880614, at *11-12 (D. Nev. Mar. 2, 2015); *Mazza*, 666 F.3d 581 at 594; *Picus*, 256

1 F.R.D. at 658 (NDTPA).

2 **103.** Customers who chose not to enroll for the Apps did not want the Apps and could
3 not have been injured by the Apps' unavailability.

4 **104.** Customers who did not own compatible smartphones and therefore could not use
5 the Apps under any circumstances could not have been injured by the Apps'
6 unavailability.

7 **ii. The Alleged Misrepresentations Caused Most Customers No Injury.**

8 **105.** Plaintiffs' causes of action under breach of warranty and consumer protection
9 statutes require that Nissan's alleged misrepresentations caused them injuries. *Houston*,
10 957 F. Supp. 2d at 1181 (C.D. Cal. 2013); *Scovil*, 2015 WL 880614 *11-12; *Mazza*, 666
11 F.3d at 594; *Picus*, 256 F.R.D. at 657.

12 **106.** Customers who did not enroll to use the Apps did not consider the Apps material
13 and therefore could not have considered representations about them material.

14 **107.** Without materiality, there can be no presumption of causality under the CLRA.
15 *See In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 134 (2009).

16 **108.** Without materiality, there can be no presumption of causality under the UCL
17 because an immaterial representation is not likely to deceive a reasonable consumer.

18 **109.** An alleged misrepresentation to which a customer was never exposed cannot
19 cause that customer any injury, nor can it justify a presumption of causation. *E.g.*,
20 *Mazza*, 666 F.3d at 594; *see also Picus*, 256 F.R.D. at 659.

21 **110.** Because customers who bought or leased their Q50s after May 2014 were not
22 exposed to any representations about the Apps, they could not have been injured by any
23 misrepresentation about the Apps.

24 **iii. Awarding Relief To The Proposed Classes Would Violate Article III.**

25 **111.** "Article III does not give federal courts the power to order relief to any uninjured
26 plaintiff, class action or not," which means that a factfinder cannot find liability as to
27 both injured and uninjured class members. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.
28

1 Ct. 1036, 1053 (2016) (Roberts, C.J., concurring).

2 **112.** The nature of Plaintiffs’ proposed class definitions means that, if the classes were
3 to prevail, the Court would have to order relief to class members who suffered no injury,
4 which would violate Article III. *See id.*

5 **113.** Plaintiffs’ proposed class definitions are such that, if the classes were to prevail,
6 large numbers of class members—indeed, a majority of class members—would receive
7 relief even though they suffered no injury, which would also violate Article III. *See id.*

8 **H. Non-Human and Non-Household Customers Have No Claims Under the**
9 **CLRA.**

10 **114.** Only “an individual who seeks or acquires . . . goods or services for personal,
11 family, or household purposes” has standing under the CLRA. Cal. Civ. Code.
12 § 1761(d). All non-human persons, as well as any individuals who use the Q50
13 primarily for business, cannot state a claim under the CLRA. *Mazur v. eBay Inc.*, 257
14 F.R.D. 563, 567 (N.D. Cal. 2009).

15 **I. Plaintiffs May Not Seek CLRA Damages.**

16 **115.** Plaintiffs may not seek damages under the CLRA. Cal. Civ. Code § 1782(a);
17 *Cattie v. Wal-Mart Stores, Inc.*, 504 F. Supp. 2d 939, 949 (S.D. Cal. 2007).

18 **J. Injunctive And Declaratory Relief Would Not Be Proper.**

19 **116.** Article III requires that plaintiffs seeking injunctive or declaratory relief show
20 that it is “likely, as opposed to merely speculative, that the injury will be redressed by
21 a favorable decision” and that they are “realistically threatened by a *repetition* of the
22 violation.” *Friends of the Earth, Inc. v. Laidlaw Env'tl. Serv. (TOC), Inc.*, 528 U.S. 167,
23 180–81 (2000); *Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006). Here, there is
24 no realistic threat of repetition that injunctive or declaratory relief would likely redress.
25
26
27
28

Dated: January 30, 2017

Respectfully submitted,

By: /s/ Peter J. Brennan

PETER J. BRENNAN

Counsel for Nissan North America, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2017, I caused the foregoing **[PROPOSED]** **STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW FOR NISSAN'S MOTION FOR PARTIAL SUMMARY JUDGMENT** to be electronically filed with the Clerk of the Court using the Court's ECF/CM system, thereby serving all counsel of record.

/s/ Jonathan A. Enfield
JONATHAN A. ENFIELD